

REMARKS

Claims 11-21 are pending in the application. Claims 11, 14, 16-18, and 20-21 have been amended. Further, claims 1-10, 12-13, 22-24, and 27 have been previously cancelled. No new matter has been introduced by the amendment.

Claim Objection

An objection has been raised to claims 11 and 25 for including the phrase “memory storing programs for enabling the processor to execute operations.” This objection is overcome in view of the amendment of claims 11 and 25 to change the wording of this phrase.

The applicant has further amended claims 11, 14, 16-18, and 20-21 to improve their form for appeal. The applicant asserts that the amendment does not alter the scope of the amended claims. The applicant respectfully requests entry of the amendment in accordance with 37 C.F.R. 1.116(b)(2).

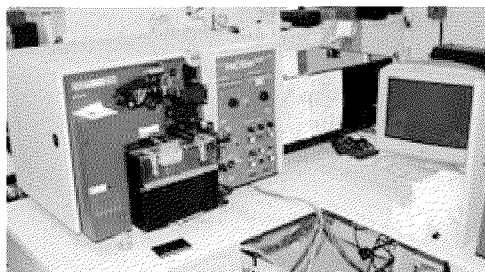
Rejection Under 35 U.S.C. § 102(b)

Claims 11, 14-17 and 25 have been rejected over Wallner et al. This rejection is overcome in view of the following remarks.

The applicant asserts that Wallner et al. fail to suggest or disclose a bacteria measuring apparatus that includes a processor and a memory including programs configured to create a scattergram of the bacteria using size information and fluorescence information as parameters. Wallner et al. further fail to suggest a processor having the capability of obtaining a maximum variance direction of a distribution of the bacteria in the scatter gram. The processor analyzes the distribution and determines whether the bacteria in the sample are bacillus or coccus based on the maximum variance of the distribution.

In addition to the cited reference, the Examiner appears to rely on subject matter disclosed in an Internet website. An excerpt from the currently-available referenced Internet document appears below.

BD FACStar Plus Cell Sorter Flow Cytometer



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Description: One BD FACStar Plus Cell Sorter Flow Cytometer with Dual Lasers, Mac G4 and Cell Quest Pro Upgrade for Mac OS X. Includes: one Spectra Physics Model 127 NeHe air cooled laser; one Coherent Innova 70 water cooled laser; Miscellaneous. Complete unit in fairl good condition. Respond to receive price with ordering information.

Classified#: 645
Date Posted: 9/16/2010
Make: Becton-Dickinson
Model: FACStar Plus
Age: 13 to 15 years
Accessories: Refer to description and pictures
History: Pre-owned by Hospital Research Lab
Dimensions: n/a
Weight: 900 lbs
Location: Canada
Price: Inquire
Payment Method: Wire Transfer
Warranty: As Is Working
Hits: 385

The applicant asserts that this information is not part of the published reference to Wallner et al. Accordingly, to the extent that the instant rejection relies on information from another source, the rejection cannot be based on novelty under Section 102(b). Further, the applicant is unable to verify the publication date of the information posted on the referenced Internet website. The applicant asserts that, regardless of the status of the additionally-cited Internet information, as stated above, Wallner et al. do not disclose the apparatus recited by claims 11, 14-17 and 25.

The Office Action characterizes claims 11 and 14-15 as reciting a functional intended use of the device. The applicant asserts these claims recite an apparatus that includes a structural configuration that performs the recited analysis. To the extent that the applicant's claims could be construed to include functional language, the applicant asserts that a functional limitation must be evaluated and considered, just like any other limitation of the claim, for what it fairly conveys to a person of ordinary skill in the pertinent art in the context in which it is used. MPEP §2173.05(g). Claims that include a functional limitation in association with an element to define a particular capability or

purpose that is served by the recited element properly define the scope of a patent claim. See, In *Innova/Pure Water Inc. v. Safari Water Filtration Sys. Inc.*, 381 F.3d 1111, 1117-20, 72 USPQ2d 1001, 1006-08 (Fed. Cir. 2004). Here, claim 11 recites a memory including programs configured to analyze bacteria from information generated by the claimed apparatus. Accordingly, the applicant asserts that claim 11 recites a particular configuration for performing the recited bacteria analysis.

Claim 11 recites a sampling device, first and second detectors, a processor, and a memory including programs. The programs are recited in the context of their operational attributes. The applicant asserts that even if the operation of the programs can be construed as functional, the recited operational aspects are associated with the memory and define a particular capability that is served by the programs in the memory. The applicant asserts that the operational attributes of the programs stored in the memory of the recited apparatus must be evaluated and considered for what it conveys to a person skilled in the art. MPEP §2173.05(g).

The applicant does not agree with the Examiner's assertion that the applicant is attempting to read the specification into the claims. (Office Action, pg. 4). The applicant refers to the specification in order to describe an example of how one skilled in the art would understand the terms of the claims. When properly construed, it is apparent that Wallner et al. does not suggest or disclose the recited bacteria measuring apparatus.

Claims 11, 14-15, 17, 19, and 25 have been rejected over Fukuda et al. This rejection is overcome in view of the following remarks.

The applicant asserts that Fukuda et al. fail to suggest or disclose a bacteria measuring apparatus including a sampling device, and first and second detectors, as described above. The applicant further asserts that Fukuda et al. fail to suggest or disclose a bacteria measuring apparatus having a processor and memory including programs that obtain a maximum variance direction of distribution of the bacteria and a scattergram. The scattergram is created by using the size information and the fluorescence information obtained from the bacteria. The processor further determines whether the bacteria in the sample are bacillus or coccus based on the maximum variance direction of the distribution. While Fukuda et al. disclose a flow cytometer measuring particle size of microorganisms in a culture, the assaying program

determines first and second particle-size distributions from scattered light and determines the differences in the first and second particle-size distributions. The applicant asserts that Fukuda et al. merely disclose a device that can distinguish among several different types of bacteria, but does not include equipment configured to perform the analysis recited by claims 11 and 25.

The applicant further asserts that there is no proper justification for failing to consider all the recited elements of the applicant's claims. As set forth above, the claims recite the operational aspects of programs included in the memory of the apparatus.

Claim Rejection Under 35 U.S.C. § 103(a)

Claims 11, and 14-21 and 25-26 have been rejected over Wallner et al. in view of and Fukuda et al. in view of Dow et al. This rejection is overcome in view of the following remarks.

The applicants forgoing remarks pertaining to Wallner et al. and Fukuda et al. are incorporated herein. The applicant asserts that, like the primary references, Dow et al. do not suggest or disclose a bacteria measuring apparatus having a processor and memory including programs that obtain a maximum variance direction of distribution of the bacteria and a scattergram. The scattergram is created by using the size information and the fluorescence information obtained from the bacteria. The applicant asserts that the particle size distribution and analysis of Dow et al., even in combination with Wallner et al. and Fukuda et al. does not suggest or disclose the applicant's size and fluorescence detectors and processor that determine whether the bacteria in the sample are bacillus or coccus based on the maximum variance direction of the distribution.

Claims 14-21 are allowable at least in view of the forgoing remarks pertaining to claim 25, from which the directly or indirectly depend.

Claim 26 is allowable at least in view of the forgoing remarks pertaining to claim 25, from which it depends.

The applicant has made a novel and nonobvious contribution to the art of bacteria measuring apparatus design. The claims at issue distinguish over the cited references and are in condition for allowance. Accordingly, such allowance is now earnestly requested.

Respectfully submitted,

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